(13)

No. 98-404

In The

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

MOTION TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND BRIEF OF JEROME GRAY, SHERMAN NORFLEET, GWENDOLYN PATTON, ISAIAH SUMBRY, DIANNE WILKERSON, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, AND NATIONAL URBAN LEAGUE AS AMICI CURIAE

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Introduction

The amici Jerome Gray, Sherman Norfleet, Gwendolyn Patton, Isaiah Sumbry, Dianne Wilkerson, the American Jewish Committee, the American Jewish Congress, and the National Urban League submit this brief in support of the position of the appellants Secretary of Commerce and others (the "Secretary").[2] Affirming the decision below would prohibit the Secretary from using statistical sampling in the decennial census for the year 2000 ("Census 2000") to determine the population of the several states for the purpose of apportionment of the House of Representatives. This would deprive the Secretary of Commerce of the ability to use methods that he has determined are necessary to obtain an accurate population count and to avoid a significant undercount of minority groups. The Secretary's decision to use the most accurate census methods available is authorized by statute and promotes the Constitutional goal of equal representation, and the decision below should be reversed.

Interest of the Amici

Each individual amicus is an African-American citizen and voter residing in a black-majority district used to elect a member of the legislature of his or her respective State. Amicus Jerome Gray is a voter in the State of Alabama, residing in House District 68. Amicus Sherman Norfleet is a voter in the State of Alabama,

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[1] This brief was not authored in whole or part by any counsel for a party. No person or entity, other than the *amicus curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] All parties to the case, except the Department of Commerce, have consented to the filing of this brief, as evidenced by their letters of consent lodged with the Clerk. The interest of the *amici* is set out *infra*.

residing in House District 72. Amicus Gwendolyn Patton is a voter in the State of Alabama, residing in House District 77. Amicus Isaiah Sumbry is a voter in the State of Alabama, residing in House District 83. Amicus Dianne Wilkerson is a voter in the Commonwealth of Massachusetts, a resident of the Second Suffolk (Senate) District. Whites constitute the vast majority of the residents of each of these states.

The individual amici have an interest in the outcome of this litigation. If the appellee House of Representatives is successful in blocking the use of statistical sampling in Census 2000, the Census Bureau predicts that African-Americans will be undercounted to a substantially greater degree than whites. This differential undercount will adversely affect amici and other African- Americans (and indeed all members of minority groups) in a number of ways. In some circumstances, the undercount will actually deprive a state of one or more representatives, who would have represented districts with substantial African-American or minority populations. Even when that is not the case, the undercount of a minority population in a district will reduce the legitimate influence of that group and the interests it represents, denying it the full representation that would come only with their Representative knowing that he or she speaks for them and that they can speak in turn at the next election. More generally, a census that undercounts African-Americans (and other racial and ethnic minorities) will deprive them as a group of the influence on our political system that their actual numbers warrant, both on a national and state level and in smaller political subdivisions where they might constitute a larger percentage of the population.

Moreover, a differential undercount adversely affects the voting rights of the individual amici in specific ways at the district level. First, if there is a differential undercount of minorities relative to whites, the amici are in more danger than whites of being placed in districts that are unconstitutionally malapportioned. Second, if there is a differential undercount of blacks or Hispanics relative to whites,

creation of majority-minority districts where necessary to comply with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, will become more difficult. *See infra*, pp. 4-6.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of the Committee that those rights will be secure only when the civil and religious rights of Americans of all faiths are equally secure. For this reason, the American Jewish Committee strongly believes that the census undercount must be corrected.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the political, civil, religious and economic rights of Jews and all Americans. It believes that security for Jews is dependent on the fair treatment of all Americans. The undercount in the Census threatens that interest not only because it affects the vital public interest in fair representation, but because it skews the distribution of governmental aid. It believes that with proper safeguards against politically motivated distortions, the Census Bureau can use sampling techniques to produce a more accurate census.

The National Urban League, founded in 1910, was organized to assist African-Americans in the achievement of social and economic equality. The League, composed of 115 affiliates in 34 states, is committed to providing assistance in areas of concern such as employment, housing, education, social welfare, development of inner city youth, economic self-sufficiency, and racial inclusion. The League carries out its mission at the local, state, and national levels by providing direct services to individuals, by building bridges between all segments of society, and by engaging in principled advocacy, community mobilization, social marketing, and communications on behalf of those it serves. Many of the League's programs are supported by federal grants. The League has a strong interest in ensuring that the African-American community is

accurately counted in the census and fairly represented in Congress.

Argument

I. If the Secretary is Denied the Use of the Methods He Has Selected to Perform Census 2000, the Differential Undercount Will Seriously Harm the Interests of the Amici.

In its Report To Congress — The Plan For Census 2000 (the "Report To Congress"), the Bureau of the Census reported that the methods that it had employed in previous censuses could not sufficiently remedy the undercount, and especially the differential undercount of minorities, that had led to a decrease in accuracy between the 1980 and 1990 censuses. Report To Congress at x, 2. Among the lessons learned from the 1990 census was that some groups were counted less effectively than others, including children, renters (particularly in rural areas), and racial and ethnic minorities, with the undercount rate for African-Americans six times greater, the rate for Hispanics seven times greater, and the rate for American Indians more than seventeen times greater, than that for non-Hispanic whites. Report To Congress at 2-4.

The differential undercount will cause states to misdraw the lines of their Congressional and other sub-state districts. For example, assume that a state has a reported population of 3.5 million, of whom exactly 25% are black and 75% are white, and that the reported figures are wrong because the state had an undercount rate of 5% for blacks and 1% for whites. The following table shows the reported and true populations:

Whole State	Reported Pop.	Undercount Rate	True Pop.
Whites	2,625,000	1%	2,651,515
Blacks	875,000	5%	921,053
TOTAL	3,500,000		3,572,568

Depending on the mix of blacks and whites in various areas of the state, districts drawn to contain exactly the same population may be above or below the norm. Assume that the state is entitled to seven members of Congress. The table below shows two districts with different demographic mixes:[3]

District 1	Reported Pop.	Undercount Rate	True Pop.
Whites	200,000	1%	202,020
Blacks	300,000	5%	315,789
TOTAL	500,000		517,809
District 2			
Whites	450,000	1%	454,545
Blacks	50,000	5%	52,632
TOTAL	500,000		507,177

In this situation, District One is 101.46% of the state's average

[3] While this example assumes a uniform undercount within each racial group, in reality the undercount may vary within each group from place to place.

district size (510,367, which is the total state population of 3,572,568 divided by 7), and District Two is 99.38% of average. These two districts have a total deviation from the norm of 2.08%, which is almost three times as large as the deviation of 0.6984% found — and disapproved by this Court — in *Karcher v. Daggett*, 462 U.S. 725 (1983).

District One is relatively underrepresented because it has a large concentration of blacks. District Two has a relatively small undercount because it has fewer blacks. Thus, both blacks and whites will be underrepresented if they live near concentrations of blacks.

Assume further that our hypothetical state is one in which there has been a history of racially polarized voting, so that blacks have found it nearly impossible to elect candidates of their choice except in black majority districts. If a legislature or court were trying to draw black-majority districts,[4] the differential undercount would make it difficult for the drafters to fine tune their plan. They might, for instance, draw districts with far more blacks than they needed — simply because the Census showed a lower number lived in the area.

Similarly, the drafters might give up on the idea of drawing one black district because of an apparent lack of a black majority. Instead, they might divide the black residential concentration between two predominantly white districts.

[4] A court or legislature may intentionally create black majority districts when necessary to remedy a violation of Section 2 of the Voting Rights Act. *See Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring).

II. The Census Act Authorizes the Secretary to Use Sampling in Conducting the Decennial Census for All Purposes, Including Apportionment of Representatives in Congress among the Several States.

A. A straightforward reading that reasonably construes all provisions of the Census Act shows that it gives the Secretary discretion to use sampling in determining population for apportionment purposes.

Congress has exercised the "virtually unlimited discretion" accorded it by the Constitution in conducting the decennial census, *see Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996), by unambiguously conferring on the Secretary of Commerce broad authority to conduct the decennial census "in such form and content as he may determine, *including the use of sampling procedures and special surveys*." 13 U.S.C. § 141(a) (emphasis added). That the authorization in Section 141(a) to use sampling extends to the determination of the population for the apportionment of Representatives in Congress among the several States is clear from Section 141(b), which requires that "the tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States" must be completed within 9 months after the census date. 13 U.S.C. § 141(b).

That broad authority of the Secretary under Section 141 to use sampling procedures in taking the decennial census is neither withdrawn nor narrowed in any way by 13 U.S.C. § 195. That section provides:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. The words and the sentence structure of that provision make it clear that, far from narrowing the broad authorization of the Secretary in Section 141 to use sampling in taking the decennial census, Section 195 *commands* the Secretary, if he considers it feasible, to exercise that authority to use sampling in carrying out all aspects of the census "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States." That "except" provision in Section 195 does not apply to the Secretary's *authority* under Section 141 to use sampling for *all* aspects of the census but only to the *requirement* in Section 195 that the Secretary use sampling, if feasible, for certain aspects of the census.

Thus, the plain language and the structure of Sections 141 and 195 of Title 13 make it clear that Congress gave the Secretary the *authority* to use sampling for *all* aspects of the decennial census (Section 141) but imposed on him the *obligation* to use sampling, where feasible, only with respect to the non-apportionment aspects of the decennial census (Section 195). As to that single excepted aspect of the census, Sections 141 and 195 leave the Secretary free to use his sampling authority or not, as he sees fit.[5]

B. The district court ignored basic principles of statutory construction by construing ambiguous Section 195 of the Census Act in isolation, and then using it to undermine the unambiguous authorization in Section 141.

The opinion of the three-judge court below taking a contrary

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[5] Courts have agreed with this analysis of Section 195. *See City of New York v. United States Department of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1333 (E.D. Mich. 1980), *rev'd on jurisdictional grounds*, 652 F.2d 617 (6th Cir. 1981).

view is at odds with a number of the most basic precepts of statutory construction, as enunciated in numerous decisions of this Court. In its opinion the court below acknowledged that the 1976 amendments of the Census Act amended two provisions of that act with respect to the use of sampling for taking the census, Sections 141 and 195. But then, instead of considering those two closely related provisions together in order to construe them, if possible, in harmony with each other, the court first considered Section 195, which it acknowledged was ambiguous, in isolation and construed it without any reference to, or consideration of, Section 141 (JS, 50a-59a). The court adopted a reading of the ambiguous Section 195 that it acknowledged is in conflict with Section 141, which is unambiguous, and then concluded that in such conflict Section 195 controls because it is the more specific of the two sections with respect to the use of sampling (JS, 61a-62a).

These amici respectfully submit that such an approach to the issue of statutory construction posed by this case is dead wrong. In its approach the court made no effort to arrive at a construction of Sections 141 and 195 that harmonizes them but instead took the indefensible position that in the same statute — the 1976 amendments to the Census Act — Congress irrationally made significant changes in Sections 141 and 195 that put them in conflict, rather than in harmony, with each other. In reaching that conclusion, the court violated the teachings of many decisions of this Court with respect to statutory interpretation.

In the first place, the court improperly ignored the basic rule of statutory construction that the existence of a possible statutory ambiguity that calls for judicial interpretation is not to be determined by considering the disputed provision in isolation, as the court did here, but "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997); see also *United States v. Morton*, 467 U.S. 822, 828 (1984). The structure of the court's opinion shows clearly that, in reaching its

construction of Section 195, the court considered only the language of that ambiguous provision, without any consideration of "the broader context of the statute as a whole," in particular, Section 141 (JS, 50a-59a). In its opinion, it is only after the court has examined Section 195 and concluded that it prohibits the use of sampling for Congressional apportionment that the court even looks at Section 141. When it finally gets around to examining that section, it acknowledges that Section 141(a) "appears to permit statistical sampling in congressional apportionment" (JS, 61a). Indeed, no other conclusion is possible with respect to the unambiguous language of Section 141(a).

In declaring that Sections 141 and 195 are in conflict so the more general Section 141 must give way to Section 195, the court violated other principles of statutory construction enunciated by this Court. In *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992), this Court directed that a court should give effect to two provisions of a statute "so long as there is no 'positive repugnancy' between the two laws," and that "courts should disfavor interpretations of statutes that render language superfluous . . ." And in *Department of Revenue v. ACF Indus.*, 510 U.S. 332, 340 (1994), this Court, quoting its prior decision in *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), stated that is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."

By these statements this Court has made it clear that the various provisions of a statute are to be construed as in harmony, so as to give effect to all of them, if the language of the various provisions permits such an interpretation. That approach to statutory construction reflects the presumption that a rational body of lawmakers intends all the provisions of a statute to have meaning and effect and to be consistent with one another. Only if the language of those provisions compels the conclusion that there is a "positive repugnancy" between them must the court apply a canon of construction for resolving such a conflict.

1. The district court incorrectly resolved the ambiguity in Section 195 by ignoring the background provided by Section 141.

The language of Section 195 does not compel the conclusion that it prohibits the use of sampling for congressional apportionment so as to conflict with the provision of Section 141(a) that authorizes the use of sampling for all purposes. With regard to the Secretary's straightforward interpretation of Section 195, whereby the "except" clause simply provides an exception to the "shall" clause, the court below acknowledged that "defendants' interpretation of the except/shall sentence structure is proper in some instances"; that other federal statutes that, like Section 195, employ an except/shall sentence structure do not proscribe the excepted activity; and that at least one other court has construed Section 195 in the same manner, *i.e.*, that excepting from the sampling mandate the use of sampling for Congressional apportionment does not proscribe the use of sampling for that purpose. *Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D.Pa. 1980). Nevertheless, the court rejected that construction of Section 195 on the ground that "[c]ommon sense and background knowledge concerning the subject matter of the exception dictate that the 'except' clause must be read as prohibitory" (JS, 52a).

The court sought to support its conclusion through two homely examples, but their use in this context simply compounds the error of the court's failure to consider the statute as a unified expression of Congress' intent. The court contended:

> First, an exception from a command to do "X" more often than not represents a prohibition against doing "X" with respect to the subject matter covered by the exception. In the party hypothetical [posited by the court], one would expect that the person who issued the directive "except for Mary, all children at the party shall be served cake"

would be quite surprised to learn that Mary had been served cake.

JS, 52a. However, even if the court's conjecture about serving cake to Mary were correct, it would be irrelevant to interpretation of the Census Act, because the party cake directive is presented as an independent command, with no background context or information about other commands directed to, or information available to, the hearer. Such a presentation is possible, of course, only because the court's discussion of Section 195 ignored Section 141, which provides Congress' basic directive to the Secretary about how the census should be conducted — namely, "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a).

The court's reliance on another hypothetical was equally unsupported and even more strikingly ignored the context in which Section 195 appears. With respect to the words "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners," the court speculated that "[i]t is far more likely that the granddaughter would be upset if the recipient of her directive were to take the wedding dress to the cleaners and subsequently argue that she had left this decision to his discretion" (JS, 53a). That, the court said, is because we have "background knowledge" that wedding dresses are "extraordinarily fragile and of deep sentimental value to family members. We therefore would not expect that the decision to take a dress to the cleaners would be purely discretionary." (Ibid.)

Enamored of its analogy, the court added, "The apportionment of congressional representatives among the states is the wedding dress in the closet," because "[w]e have a prior understanding that demands the conclusion that whether to use statistical sampling is not to be left to the discretion of the Secretary of Commerce absent a more direct congressional pronouncement." (Ibid.) That "prior understanding" is an understanding of "the special position occupied

by congressional apportionment in the universe of functions entrusted to the Bureau of the Census" (JS, 54a). However, that special position is as much a reason to conclude that Congress permitted the Secretary to exercise his discretion in determining the best method of conducting the census for apportionment purposes as it is to conclude that Congress tied the Secretary's hands in that regard. Furthermore, extraordinarily, when looking for background knowledge that might resolve the ambiguity in Section 195, the court looked only to pre-1976 history and totally ignored the "more direct congressional pronouncement" in Section 141, only a few sections earlier in the same statute!

The court was correct in noting that there was a "prior understanding" before the 1976 amendments that the use of sampling for Congressional apportionment was not to be left to the discretion of the Secretary of Commerce. That is because, prior to the 1976 amendments, the only authorization in the Census Act of the use of sampling for any census purposes was the provision in Section 195 that the Secretary of Commerce "may" use sampling for census purposes except for Congressional apportionment. In the court's view Congress would not have changed that "prior understanding" about such an important matter by way of what the court characterized as "a permissive negative inference from an exception to a statutory mandate" in Section 195. But that, of course, is not all that Congress did in the 1976 amendments of the Census Act. In Section 141, Congress expressly ordered the Secretary to "take a decennial census . . . in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress clearly intended that census to provide the population tabulation required for the apportionment of Representatives, for it required that the "tabulation . . . as required for the apportionment of Representatives in Congress among the several states" be completed by a certain date. 13 U.S.C. § 141(b). Knowledge of *that* Congressional requirement — what Congress plainly said *in the same statute* — is the background knowledge necessary to resolve any ambiguity in

Section 195, not conjecture about Congress' weighing of the desirability of administrative discretion.

2. The district court failed to give proper weight to the unambiguous wording of Section 141 authorizing the Secretary to use sampling procedures to conduct the census.

The willingness of the court below to ignore Section 141 is apparent not only in its discussion of wedding dresses but in its fleeting review of Section 141 itself. The court notes the Secretary's argument that because Section 141(a), which "constitutes the sole authority to take the decennial census," expressly permits the use of sampling, and Section 141(b) expressly refers to the "tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several states," the use of sampling must be permitted in performing that apportionment tabulation (JS, 60a). However, the court offers no rebuttal to that argument, except to recite the House's contention that because Section 141(g) defines "census of population" to mean "a census of population, housing, and matters relating to population and housing," the reference to sampling in Section 141(a) "applies only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration" (JS, 60a).

That rebuttal, however, is plainly invalid. If one substitutes the definition of "census of population" given in Section 141(g) for the term as it appears in Section 141(a), Section 141(a) becomes:

> (a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population, housing, and matters relating to population and housing as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

The substitution neither supports the House's position nor introduces any ambiguity into Section 141(a). To the contrary, the section remains an unequivocal authorization for the Secretary to use his discretion in conducting the census of population *and* housing *and* matters relating to both "in such form and content as he may determine, including the use of sampling procedures and special surveys." The last sentence of Section 141(a) also authorizes the Secretary to collect "the myriad of demographic data" referred to by the court below, but the authorization of sampling appears not in that sentence but in the preceding sentence in which the Secretary is commanded to take the "decennial census of population."

The other argument of the House that the district court recites, apparently with approval, is that "the broad authorization of Section 141 to use sampling in most aspects of data collection cannot affect the prohibition concerning apportionment in Section 195, because, if it did, the 'except' clause of Section 195 would be rendered meaningless" (JS, 60a). However, since Section 141 provides authorization to use sampling not simply "in most aspects of data collection" but to use sampling however the Secretary may determine in "tak[ing] a decennial census of population," the court misstates the meaning of Section 141. If Section 195 is construed in the straightforward way in which the Secretary construes it, the "except" clause of that section is not meaningless at all, but simply excepts the determination of population for purposes of apportionment of Representatives from the *requirement* that the Secretary use sampling to carry out the provisions of Title 13, leaving it to the Secretary's *discretion*, as provided in Section 141,

whether to use sampling in making that determination.[6]

It is the construction of the Census Act adopted by the district court and the House that renders a portion of that act meaningless. On their reading, Section 195 directs the Secretary to use sampling in carrying out all his duties under the Census Act except for determining population for apportionment purposes, and *also* prohibits the Secretary from using sampling in making the latter determination. That covers the field with regard to the use of sampling, and there is nothing left to be covered by the explicit authorization in Section 141(a) for the Secretary to conduct the census in such form and content as he may determine, "including the use of sampling procedures and special surveys."

It is not a credible reading of the statutory language that Congress adopted in 1976 to read out of Section 141 (the central provision of the Census Act that provides the statutory basis for the Secretary's taking the decennial census) an explicit, unambiguous, and unrestricted authorization for the Secretary to use sampling to conduct that census, on the basis of an ambiguously worded subsidiary provision for which there is a reasonable alternative construction. If Congress meant, in adopting the 1976 changes to the Census Act, to do just what the Secretary says it meant — to authorize him to use sampling in his discretion in determining population for apportionment purposes, and to require him to use sampling, if feasible, for other Census Act purposes — it would have said just what it did in Sections 141 and 195 of the Act.

In light of Congress' unequivocal grant of authority to the

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[6] The presence of the phrase "if he considers it feasible" in Section 195 does not change this conclusion. The provision remains a directive that, if the minimum requirement of feasibility is met, the Secretary use sampling in non-apportionment aspects of the census. Such a directive gives the Secretary considerably less leeway not to use sampling than if it had simply been left to his discretion, as it is in Section 141.

Secretary to use sampling in taking the census, a court should require unambiguous language elsewhere in the statute, even in a "more specific" provision, to render that grant meaningless. Section 195 does not contain such unambiguous language. Had Congress in fact intended not to permit the Secretary to use his broad authority under Section 141 to determine population for apportionment purposes, it could easily have said so, *e.g.*, by providing, "The Secretary shall not authorize the use of the statistical method known as 'sampling' for the determination of population for purposes of apportionment of Representatives in Congress among the several states. The Secretary shall, if he considers it feasible, authorize the use of sampling in carrying out the other provisions of this title." However, Congress did not so provide. Instead, it simply excepted the determination of population for purposes of apportionment from the requirement that, if feasible, sampling be used in carrying out the provisions of the statute, thereby leaving the use of sampling for apportionment purposes to the Secretary's discretion as provided in Section 141.

A fair reading of Section 195, considered together with Section 141(a), is that Section 195 deals with one subject — the mandatory use of the sampling that was authorized by Section 141(a) — and that it mandated the use of sampling for all purposes except congressional apportionment. To construe the "except" clause of Section 195 to mean anything more than that use for Congressional apportionment was simply excluded from the sampling mandate of that section is to give it a reading the words do not require and the language of Section 141(a) rejects. Reading Section 195 as mandating the use of sampling for non-apportionment purposes and leaving the use of sampling for apportionment purposes subject to the discretionary authority conferred on the Secretary by Section 141(a) does no violence to the language of either Section 141(a) or Section 195 and gives full effect to both provisions. The interpretation of Section 195 by the court below, on the other hand, severely limits the broad discretion Congress obviously intended to confer on the Secretary in the taking of the decennial census,

including the use of sampling for all purposes.

3. The district court's resort to legislative history also ignored the clear language of the Census Act.

The court also sought to support its view of Section 195 by accepting the House's argument that Congress would not have legislated such a departure from past practice in Section 195 without a clear indication of its intent to do so in the legislative history of the 1976 amendments. In support of that argument the court cited language from a dissenting opinion by then-Justice Rehnquist in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980), that "where the construction of legislative language . . . makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." While, as the district court notes, that language was subsequently quoted in *Chisom v. Roemer*, 501 U.S. 380, 396, note 23 (1991), the *Harrison* Court flatly rejected, in construing the statute involved in that case, use of "the theory of the dog that did not bark." 446 U.S. at 592.

The use of that theory is particularly inappropriate with respect to a statute such as the 1976 amendments to the Census Act. The fact is that the dog did bark, and at the place where its message was most unmistakable — in the language of the statute itself. Prior to the 1976 amendments, the only authorization for the use of sampling was that in Section 195 for purposes other than congressional apportionment. But in 1976 Congress added language to Section 141(a) expressly authorizing the Secretary to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys."

It is apparent that by expanding the role of sampling in both Sections 141(a) and 195 in 1976 Congress expressed enhanced confidence in the reliability of sampling to measure the population. That enhanced confidence is reflected in language from the

Conference Report on the 1976 amendments that is quoted in the opinion of the court below: "This section [195], as amended, strengthens the Congressional intent that, whenever possible, sampling shall be used." (Emphasis added.) With such expressed confidence in the reliability of sampling, there is simply no basis for reading Sections 141 and 195 to mean anything but that Congress was changing the use of sampling for non-apportionment purposes from permissive to mandatory and changing the use of sampling for apportionment purposes from prohibited to permissive.

III. The Constitution Does Not Prohibit the Use of Statistical Sampling in Determining Apportionment in the Decennial Census.

Although the district court did not address the House's contention that the Constitution prohibits the use of statistical sampling in conducting Census 2000, if this Court finds that the Census Act does not prohibit such use it may wish to address the constitutional issue, so as to avoid further delay in the Secretary's implementation of plans for Census 2000. Amici submit that the Constitution not only permits the Secretary to use sampling procedures in conducting that census, but that, given the scientific and demographic evidence before him, it is the only feasible way for him to carry out the Constitutional mandate.

Even the House does not dispute the desirability of improving the accuracy of Census 2000 or reducing the differential undercount, and it cannot dispute the conclusions reached by the Secretary, with advice from special expert panels of the National Academy of Sciences (the "Academy"), that

> It is fruitless to continue trying to count every last person with traditional Census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to

improved coverage or data quality.

Report To Congress at 7 (quoting finding of Academy Panel on Census Requirements in the Year 2000 and Beyond). The House therefore claims that the Constitution prohibits the Secretary from using more accurate methods of determining population. That argument is not correct.

The House contends that the Secretary's decision to use statistical sampling to improve the accuracy of Census 2000 violates the Constitution because it would not constitute an "actual Enumeration," which, it contends, refers only to a "headcount," and not to what it calls a "statistical estimation." According to the House, the Constitution requires the Secretary to ignore the advice that sampling procedures be used in Census 2000 that he received from the Academy, including three panels established by its Committee on National Statistics to study how to improve Census 2000, the American Statistical Association, the American Sociological Association, the General Accounting Office, and the Inspector General of the Department of Commerce, Report To Congress at 7-8, 24-25, and instead to employ the same methods that, the House claims, census takers have applied for 200 years, however inaccurate may be the results of those methods as applied to today's population. The House contends, that is, that the Constitution requires that a certain *procedure* be used for determining Congressional apportionment, not that a certain *result* be achieved. That procedure, it adds, must be basically the same one used at the time of the Constitutional Convention in 1787. Those arguments find no basis in the text of the Constitution, and there is no historical or other support for a refusal to use the best methods available to count every group of Americans fairly and accurately.

A. The Constitution prescribes a specific goal — apportionment according to the numbers of persons in the several states — rather than a specific procedure for determining the numbers to be used for such apportionment.

1. Article I requires Congressional apportionment on the basis of the "respective Numbers" of the states, not on the basis of a particular procedure for determining those numbers.

Despite the House's contentions, the Constitution does not enshrine the census technology of the Eighteenth Century. It sets out what result must be achieved — apportionment of Representatives on the basis of "the whole numbers of persons in each State," *see* U.S. Const. amend. XIV, § 2, and it leaves to Congress the responsibility of establishing the manner in which those "numbers of persons in each State" are to be determined. Thus, the Constitutional Convention initially set out in a single sentence the principle for determining apportionment of the House of Representatives:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. Const. art. I, § 2, cl. 3, first sentence. The constitutional principle is simply that Representatives are to be apportioned among the states "according to their respective Numbers," and those numbers are to "be determined" by adding to "the whole Number of free Persons," excluding Indians not taxed, "three fifths of all other Persons." The remaining apportionment question before the

Constitutional Convention was *when* those numbers were to be determined, and the Convention answered that question in the second sentence of the clause: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years . . . ." U.S. Const. art. I, § 2, cl. 3, second sentence.

The House plucks the term "actual Enumeration" from the second sentence of this clause and argues from those two words that Article I requires a particular *procedure* for determining the "respective Numbers" of the states, namely, what the House calls a "headcount." However, neither the words themselves nor their context can support such an argument. At the time of the Convention, as now, an "enumeration" is a determination of a number, and the word is often used to mean "census."[7] The addition of the modifier "actual" in this instance adds the requirements, in effect combining two senses of the word "actual" current at the time, that a census really be taken and that it ascertain the number of persons at the time it is taken.[8]

Not only do the words "actual Enumeration" not in themselves

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[7] Thus, the first meaning of "enumeration" given by the Oxford English Dictionary is "the action of ascertaining the number of something; *esp.* the taking a census of population; a census." *The Compact Oxford English Dictionary* 522 (2d ed. 1991) (original v. 5, p. 311). Its first example of the use of the term, from 1577, is "That holy man did rightly know the enumeration of the sacred Trinitie," and the second, from 1810, is "According to the enumeration in 1801, the population amounted to 1600 persons." *Id.*

[8] Thus, two of the definitions of "actual" given by the Oxford English Dictionary are "Existing in act or fact; really acted or acting; carried out; real; — opposed to *potential, possible, virtual, theoretical, ideal*," and "In action or existence at the time; present, current." *The Compact Oxford English Dictionary* at 15 (original v. 1, p. 132). As an example of the latter sense, the entry quotes Edmund Burke's 1790 *French Revolution:* "If this be your actual situation, compared to the situation to which you were called." *Id.*

require that the census be conducted in any particular manner, but the Census Clause itself undercuts any such suggestion. First, it commences with the words "*The* actual Enumeration" (emphasis added), referring back to the "respective Numbers" that were to "be determined" according to the formula prescribed in the first sentence. If the second sentence had been intended to introduce the additional requirement that those numbers must be determined by a particular procedure, such as the one-by-one headcount method that the House endorses, the drafters would more naturally have written, "*An* actual Enumeration shall be made . . ." (emphasis added), indicating that the enumeration was a requirement not previously referred to. Second, the sentence expressly leaves it to Congress to prescribe the manner of conducting the census: The enumeration is to be made "in such Manner as [Congress] shall by Law direct." If the clause required that the census consist of a person by person headcount, its "Manner" would have already been determined by the Constitution itself rather than being left to Congress.

2. The Fourteenth Amendment does not prescribe a particular method of determining the populations of the states.

The Fourteenth Amendment does not, as the House argues, limit Congress' discretion under the Census Clause in determining the "Manner" by which the census may be conducted. The Fourteenth Amendment provides, in pertinent part,

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

U.S. Const. amend. XIV, § 2. This Amendment simplified the rule for determining apportionment: Inasmuch as all persons were now free, the census-taker need only determine "the whole number of persons in each State," without any need to determine which were

free and which were not and to count each person in the latter category as three fifths of a person.

The Fourteenth Amendment implicitly amends Article I, § 2, cl. 3, but it does not specify which sentences in that clause are amended. The first sentence of the Fourteenth Amendment plainly provides the substantive rule, different from that in the first sentence of Article I, § 2, cl. 3, for apportioning Representatives among the states. That *substantive* rule — apportion according to the number of persons in each state — does not leave room for any additional requirement that a particular *procedure* be used for ascertaining those numbers, and the wording of the amendment does not suggest that any room was intended to be left.[9] Thus if, contrary to the linguistic and historical evidence, the Census Clause imposed a procedural requirement on the manner in which the "respective Numbers" in the first sentence of Article I, § 2, cl. 3 were to be determined, that additional requirement did not survive adoption of the Fourteenth Amendment, which contains no intimation of any procedural requirement on the method of determining the "whole number of persons in each State."

In its argument below the House did its best to ignore the fact that it is section 2 of the Fourteenth Amendment, not the Census Clause, that provides the rule for apportionment of the House of Representatives. Tacitly admitting that it is the Fourteenth Amendment, not Article 1, that controls, the House perforce argued

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[9] Logically, the Constitution cannot require *both* a particular procedure *and* a particular result, since use of the prescribed procedure may not lead to the prescribed result. Accordingly, an interpretation of the second sentence of Article I, § 2, cl. 3 whereby it imposes a procedural requirement, in addition to the substantive requirement imposed by the first sentence, faces the hurdle of logical inconsistency from the outset. An interpretation that would import a procedural requirement into section 2 of the Fourteenth Amendment, where none is even adverted to, would, in addition, ignore the decision of its drafters to omit any reference whatsoever to the "enumeration" on which the House bases its Article 1 argument.

that in the Fourteenth Amendment phrase "counting the whole number of persons in each State," the term "counting" specifies the method by which the "whole number of persons" is to be determined, and that method is to count people one by one. The only support that the House could muster for this reading, however, was a dictionary entry for one of the several meanings of "count," ignoring the fact that in the participial phrase "counting . . ." the term is generally used with a different primary sense, that of "to include in the reckoning; to reckon in." *The Compact Oxford English Dictionary* at 346 (original v. 2, p. 1055) (including historical examples of the participial phrase used in this sense, in contrast to no such example for the sense cited by the House). In this sense, the term "counting" indicates *who* should be included in the enumeration, not *how* the number should be ascertained. In the context of the words "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed" in the first sentence of section 2 of the Fourteenth Amendment, the purpose of which was to change a rule that counted only three-fifths of slaves to one in which every person counts equally, this — and not a requirement of "nam[ing] one by one," as the House contended — is plainly the sense in which the word was used. The syntax of the sentence requires the same conclusion, since the phrase "counting . . . taxed" does not modify the subject of the sentence, "Representatives," but the term "respective Numbers," meaning that those numbers should include the whole number of persons, not three-fifths of some persons, in each state.

The focus of the Fourteenth Amendment is on equal protection of the laws and so, in the apportionment clause, on apportionment in accordance with the "whole number of persons in each State." This change in the language reflected not only the abolition of slavery and so of counting each slave as only three fifths of a person but also the drafters' reevaluation of the criterion for apportionment. Section 2 of the Fourteenth Amendment was drafted to make clear that the basis of representation would be "numbers," which meant the "whole population," as opposed to a more restrictive criterion

(*e.g.*, voters).[10] Yet instead of acknowledging this goal of equal representation for the "whole number," the House would use the very phrase in which the drafters memorialized their intention to base representation on that goal — "counting the whole number of persons in each State" — to limit Congress' ability to "direct" the "Manner" of conducting the census by prescribing a procedure that we know *will not count* the whole number of persons in each state, and in particular will not count the whole number of black persons. To read this amendment (the animating purpose of which was to count former slaves equally with others for purposes of representation in Congress) to require a method of enumeration that knowingly undercounts the "whole population" of their descendants would be a regrettable and perverse result.

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[10] The drafters consciously opted for language that would include the "whole population." *See* Remarks of Senator Howard, May 23, 1866, *The Congressional Globe*, S.P. 2767, *reprinted in The Reconstruction Amendment Debates: The Legislative History and Contemporary Debates In Congress on the 13th, 14th and 15th Amendments* 220 (Alfred Avins, ed. 1967) (discussing a predecessor to the Fourteenth Amendment containing the same "counting" phrase) ("Its basis of representation is numbers, whether the numbers be white or black; that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime."); *id.* at 221 ("The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution."); *id.* ("And, sir, the true basis of representation is the whole population. It is not property, it is not education, for great abuses would arise from the adoption of one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency — a thing to be avoided.").

B. The Constitutional requirement of apportionment according to actual population figures rather than particular census-taking methods promotes the goals of objectivity and avoidance of political manipulation and the Constitutional goal of equal representation.

In the court below the House sought to buttress its constitutional argument by contending that permitting the use of statistical sampling in conducting the census invites vagueness, subjectivity, and political manipulation. It sought to contrast unfavorably the "estimation" involved in "sampling" with the concept of "actual Enumeration" it prefers. But this elevates terminology over reality and contradicts the conclusion of the professional statisticians and demographers — experts in census-taking rather than politics, on whom the Secretary has preferred to rely — that the use of sampling in Census 2000 should minimize the opportunity for political manipulation, not increase it. Report To Congress at x.

Not only can traditional census methods provide only an estimate of the true population, but we know that they provide a systematically *inaccurate* estimate, and that "an accurate and cost-effective census cannot be taken without the introduction of a limited use of sampling." Report To Congress at x. The House claimed below that the use of procedures more complex than a "headcount" are subject to political manipulation and vagueness, and contrasted the desire of the framers of the Constitution for objectivity with what it called the "subjectivity" of statistical methods. However, if there is any safe harbor from "political manipulation," trying to count heads in a large and complex population cannot provide one. A census that can actually and accurately count the entire population, one by one, is a will-o'-the-wisp, as the House well knows.

> In the debate over methods to be used in Census 2000, **the issue is not whether to "sample" but whether to sample scientifically.** Census takers have never been able to

> contact and count each and every resident of this nation. As a result, information on less than the whole population has always been used to characterize the whole population.

Report To Congress at 23 (emphasis in original). Using traditional census methods will make the accuracy of the count, and the extent of the differential undercount of minorities, dependent upon the size of the budget allocated to the census, and even then a significant total undercount, and the recurring problem of the differential undercount, would be certain. Report To Congress at 33. In contrast to the exclusive use of traditional methods, which invites political manipulation through manipulating the size of the census budget and which rests on the hypocrisy inherent in purporting to try to reach an important goal without using the scientific techniques that one knows to be necessary to do so,

> [s]ampling has known, objective properties. The known properties of sampling are preferable to the certainty of missing several million people using traditional counting methods alone. In fact, uncontrolled error is more of a concern with a traditional headcount than it is with sampling.

Report To Congress at 49.

The House's memoranda below were replete with references denigrating the methods planned by the Secretary as mere "estimation" as opposed to the "actual Enumeration" that it contends has hitherto been conducted. But that comparison is sheer rhetoric. Given the known impossibility of doing a headcount of the populations of the states, as if all their residents were lined up at their local polling places, the best that can be done to determine their "respective numbers" is to use the most accurate methods that a combination of traditional census techniques and modern statistics

and demographics can provide. *See* Report To Congress at 49-51.[11] While such methods, like the traditional "headcount," can only produce an "estimate," albeit a much more accurate one than ever achieved before, they have the advantage, unlike the inaccurate and invidiously discriminatory techniques preferred by the House, of providing the opportunity for ever more accurate estimates as experience is gained and techniques improve.

There is no safe harbor from political manipulation, but there is a requirement, set forth in the Constitution, that provides the

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[11] For example, the House argued below, referring to the discussion of proposed sampling procedures in the Census Bureau's Census 2000 Operational Plan, that the Secretary's proposal would not produce a precise number but only an "estimate," because the sampling procedures will involve a "sampling error," measured by a "coefficient of variation." Census 2000 Operational Plan at IX-24-25. However, the page and table to which the House referred show that when the sampling methods proposed by the Secretary are used, the error arising from the use of sampling is much smaller than the coverage error, commonly called the "undercount," that will occur if no statistical sampling methods are used. For example, the projected sampling error for the United States in total for Census 2000 is 0.1%, as compared to an undercount rate of 1.6% in the 1990 Census. Sampling methods would thus reduce the error from the 1990 census by 1.5% at the country-wide level. Sampling methods would reduce the error in the count of Blacks by 3.8% (0.6% sampling error vs. 4.4% undercount rate) and reduce the error in the count of persons of Hispanic origin by 4.2% (0.8% sampling error vs. 5.0% undercount rate). Census 2000 Operational Plan at IX-25. Thus the Secretary's so-called "statistical estimate" is 1600% more accurate at the country-wide level, 733% more accurate in the case of Blacks, and 625% more accurate in the case of persons of Hispanic origin, than what the House calls an "actual Enumeration" of the population produced in 1990. When one also takes into account the fact that the 1990 census made an exhaustive attempt to make traditional census-taking methods work, that the census-taking environment will be even more difficult in 2000 than in 1990, and that without sampling Census 2000 would cost at least an additional $675 million and, even with that additional expenditure, would probably have a national undercount rate of 1.9%, as compared to the 1990 undercount of rate of 1.6%, Report to Congress at x-xi, 4-6, 37-39, Census 2000 Operational Plan at IX-25, it is apparent that the prohibition of sampling procedures in the 2000 Census would produce only an "estimate," and an "estimate" that would be considerably less precise than the use of scientific sampling methodology would make possible.

greatest protection from it: the requirement that "Representatives shall be apportioned among the several States according to their respective numbers . . ." The Constitutional goal of equal representation, *see Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (the Secretary's conduct must be consistent with "the constitutional language and the constitutional goal of equal representation" (internal quotation omitted)); *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (noting the "underlying constitutional goal of equal representation"); *Dept. of Commerce v. Montana*, 503 U.S. 442, 461 (1992) ("As we interpreted the constitutional command that Representatives be chosen 'by the People of the several States' to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States 'according to their respective Numbers' would also embody the same principle of equality."), is best served by determining, as accurately as possible, what the "respective numbers" of the states are, and following that polestar is the best safeguard against political manipulation. Demographic science and statistics provide the best available means for pursuing that goal, and the standards of good science and mathematics — those represented by the Academy, for example — provide little leeway for subjectivity or political manipulation. By contrast, when the Constitutional requirement of determining the "respective numbers" of the states is disregarded, and adherence to "traditional" methods of census-taking substituted as the goal, the way is open to political manipulation as the gap between reality and those traditional methods grows ever greater.

Conclusion

For the foregoing reasons, the Secretary's decision to use statistical sampling to supplement traditional census methods in Census 2000 is constitutional, authorized by statute, and promotes the Constitutional goal of equal protection and voting rights for all Americans. The judgment of the district court should be reversed.

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